NO. 22,700

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PIOCHE MINES CONSOLIDATED, INC.
and ELY VALLEY MINES, INC.,

Petitioners,

vs.

THE HONORABLE ROGER T. FOLEY,
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEVADA,

Respondent.

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Petitioners' Opening Brief

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Respondent.

Petition for Writ of Mandamus and Prohibition

PETITIONER'S OPENING BRIEF

STATEMENT OF THE ISSUES.

The following issues are pertinent to this Petition:

1. Whether the District Court abused its discretion in declining to grant Petitioners' Motion for Return of Corporate Properties pending an adjudication of the legal status of Petitioners' officers and directors.

2. Whether Respondent has required the relitigation or reconsideration of questions or issues which this Court has twice previously decided, and if so, whether it was error for Respondent to do so.

3. Whether Respondent has committed error in extending the

jurisdiction of the lower court to include consideration of questions and "issues" pertaining to the legal status of Petitioners' officers and directors when such questions or issues are not within the scope of the pleadings.

4. Whether Respondent has erred in providing relief against Petitioners and their officers and directors which is outside the scope of the pleadings and hence beyond the jurisdiction of the lower court.

5. Whether a non-moving, non-party to Petitioners' Motion For Return of Corporate Records has standing to seek affirmative relief under said motion.

6. Whether Respondent erred in his interpretation of, or disregard for, Nevada statutory law and general corporation law in refusing to recognize the authority of Petitioners' officers and directors to act on behalf of the defendant corporations (Petitioners herein).

STATEMENT OF THE CASE.

By way of preface, it should be noted that all references to transcripts and exhibits in this brief shall refer to those exhibits to the Petition on file in this proceeding No. 22,700. Citations such as "Tr. N" will refer to transcript and exhibit, and will thereafter be followed by citations as to page and lines.

In order to submit a self-contained opening brief, Petitioners shall with this Court's permission, substantially repeat the statement of the case set forth at pages 6-10 in Petitioners' Petition For Writ Of Mandamus And For Writ Of Prohibition, Either Or Both In The

Alternative, And For Other Writ Or Relief.

The statement set forth herein shall be purposely abbreviated in deference to the Court's time and its extensive previous exposure to all facets of the case--No. 311, below. Only those facts deemed pertinent to this Petition shall be noted.

NATURE OF THE CASE.

The complaint was filed February 20, 1960 by plaintiff DOLMAN. The suit was a stockholder's derivative action calculated to secure relief for purported mismanagement on the part of the late JOHN JANNEY as President of the defendant corporations, to assure payment of property taxes and the payment of wages allegedly due corporate employees. No other relief was sought by plaintiff.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

On April 4, 1960, the two corporations answered and counterclaimed, DOLMAN answered to the counterclaim on August 3, 1960, and JANNEY answered and counterclaimed on May 29, 1961.

An amended complaint was filed June 6, 1961 adding four stockholders as parties plaintiff. On July 3, 1961, DOLMAN answered JANNEY'S counterclaim.

On March 16, 1962 an Order appointing one AMERICO CAMPINI as receiver of the defendant corporations was signed and filed along with a restraining order.

On October 8, 1962 judgment was filed and entered which, inter

alia, continued the receivership, restrained JANNEY from disposing of corporate assets and records and awarded a $1,000,000.00 judgment against JANNEY.

This Court, in its 1964 judgment in No. 17,709 (Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 333 F.2d 257, Cert. denied, 380 U.S. 956, 85 S. Ct. 1081, 13 L. Ed. 2d 972), held, inter alia, that the lower court orders directing appointment of a receiver were reversed, and the receivership was to be vacated. The receiver was directed to account, settle his accounts, and return the properties and records of the defendant corporations to them prior to his discharge.

Subsequent to the Court's 1964 decision, an appeal was again taken by these Petitioners, the pertinent aspects of which concerned the District Court's legal devitalization of Petitioners' directors and officers, and the issuance of a restraining order in perpetuation of the control of the receiver. In its decision of November 8, 1967 (Ely Valley Mines, Inc. v. Lee, 9 Cir., 385 F.2d 188), this Court, inter alia, held that the corporate officers and directors had not been outlawed or removed from office and that this is not an action for such relief (p. 190 of opinion). The Court also held that the continued retention of corporate records and properties by the receiver was a continuing wrong to the corporations, and that said records and properties should be returned "forthwith" and prior to the settlement of the receiver's accounts unless the trial court determined promptly, a valid reason for not doing so. (P. 193 of opinion.)

On January 5, 1968 the defendant corporations filed a Motion For

Return Of Corporate Properties which was thereafter set for hearing on February 12, 1968. On February 9, 1968, one judicial day before the scheduled hearing, plaintiff DOLMAN and receiver CAMPINI filed their Motion To Continue Hearing Date On Defendants' Motion For Return Of Corporate Properties supported by an unsworn, unacknowledged "affidavit" purportedly signed by CAMPINI. Petitioners' counsel objected to the "affidavit" and asked that it be stricken (Tr. F-8: 10-15) but JUDGE FOLEY held:

> "If it is not an affidavit it is a statement at least of the contentions made as to the validity of the election of the purported officers of this company.: (Tr. F-9: 8-10)

The trial judge also raised, sua sponte, the issue of the validity of the defendant corporations' officers (Tr. F-5: 20-25; 6: 15-21) and thereafter granted the DOLMAN and CAMPINI motion continuing the hearing on Petitioners' Motion For Return Of Corporate Properties until March 12, 1968.

In the hearing on March 12, 1968 of Petitioners' Motion For Return Of Corporate Properties, JUDGE FOLEY indicated that he was ready to order the return of the records and properties to the defendant corporations "right now" (Tr. B-26: 5-10) but held that he would not do so "until it is determined that there are proper officers." (Tr. B-40: 2-6) The trial judge also opined that "it seems to me that we haven't a valid Board of Directors" (Tr. B-26: 2-3) and thereafter ordered the parties to submit briefs on the legal status of Petitioners' officers and

directors. (Exhibit A)

In the last hearing on Petitioners' Motion For Return Of Corporate Properties held May 22, 1968, Respondent first denied said motion (Tr. N-28: 14-25; Exhibit O) and subsequently ordered the withdrawal of the denial (Tr. N-38: 9-14; Exhibit O) in order to give "full consideration...to the position stated by Mr. Sargent [a New York attorney who is not a party to the action or the motion]...." Respondent then ordered the cause continued indefinitely (Exhibit O) in order for counsel to consider the proposals submitted by strangers to the action and interlopers to the motion. (Tr. N-42: 2-19)

STATEMENT OF FACTS.

The facts pertinent to the instant proceeding are basically interspersed in the immediately preceding paragraphs. In brief, however, the following facts may be re-emphasized as the underpinnings of this Petition:

This Court, in Pioche Mines Consolidated, Inc. v. Dolman, supra, ordered the receivership vacated and Petitioners' properties and records returned. Over three years after said decision, in a subsequent appeal by the defendant corporations (Petitioners herein) this Court again ordered Respondent to return Petitioners' properties and records "forthwith, unless the court determines promptly, that there is a good reason for not doing so." (See Ely Valley Mines, Inc. v. Lee, supra at 193) In the latter opinion, this Court also reiterated its declaration in the former opinion that the instant action was not a

proper vehicle for removing or outlawing Petitioners' officers and directors and held further, that said officers and directors have not been outlawed or removed. (Id at 190)

During an initial hearing on Petitioners' Motion For Return Of Corporate Properties held February 12, 1968 Respondent again raised, sua sponte, the question of the validity of Petitioners' officers and directors. (Tr. F-5: 20-25; 6: 15-21) In a subsequent hearing held March 12, 1968 Respondent declared that he was willing to return the properties and records "right now" (Tr. B-26: 5-10) but refused to do so "until it is determined that there are proper officers." (Tr. B-40: 2-6)

At the conclusion of the last hearing on said motion, held May 22, 1968, Respondent refused to recognize Petitioners' officers and directors (Tr. N-27: 19-25; 28: 1-25) and ended up continuing the cause indefinitely (Exhibit O) in order that counsel might consider, over Petitioners' objection, proposals submitted at said hearing by non-moving strangers to the action. (Tr. N-42: 5-19)

SUMMARY OF THE ARGUMENT.

Petitioners contend that Respondent was obligated to promptly obey the mandate of this Court in Ely Valley Mines, Inc. v. Lee, supra. Respondent declared that he was ready to return the corporate records and properties to Petitioners "right now," but that he would not do so until either the entitlement of Petitioners' officers and directors to their respective offices has been proved "beyond all doubt"

or until he is so ordered by this Court. Respondent has thus divested himself of all further discretion to withhold the immediate return of Petitioners' records and properties since this Court has held that the legal status of Petitioners' officers and directors is not before the lower court, and since Respondent has indicated that the legal status of said officers and directors is the only impediment to the return of said records and properties. Petitioners specify error by Respondent in not promptly following this Court's mandate, as aforesaid, since Respondent's only ground for not doing so was expressly eliminated as a reason for withholding prompt return of Petitioners' records and properties.

This Court, first in Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 333 F.2d 257, Cert. denied, 380 U.S. 956, 85 S. Ct. 1081, 13 L. Ed. 2d 972, and later in Ely Valley Mines, Inc. v. Lee, 9 Cir., 385 F.2d 188 held that the instant case is not an action upon which relief could be granted to depose or disfranchise Petitioners' officers and directors. In the latter decision, special clarification was given both to Respondent and plaintiffs emphasizing that Petitioners' officers and directors had not been outlawed or removed. Notwithstanding the aforesaid decisions of this Court, Respondent has continued to assert the viability of his earlier finding that Petitioners are without valid directors and has forced Petitioners to relitigate questions or "issues" pertaining to the validity of its officers and directors, which questions or "issues" were twice previously determined by this Court. This is specified as error.

Respondent, in requiring an adjudication of the validity of Petitioners' officers and directors seeks to extend the jurisdiction of the lower court to include issues which are outside the scope of the pleadings. This is specified as error, since a court may not properly consider issues or questions which have not been pleaded.

Although the amended complaint on file herein sought no relief against Petitioners and sought no invalidation or removal of Petitioners' officers and directors, Respondent has provided such relief by finding that Petitioners have no valid directors and refusing to recognize or acknowledge same as Petitioners' agents. The result of such finding and refusal has been a complete and indefinite frustration of this Court's mandate in Pioche Mines Consolidated, Inc. v. Dolman, supra, and Ely Valley Mines, Inc. v. Lee, supra, requiring the wrongfully appointed receiver to return the properties and records of the Petitioners to them. Petitioners contend that it was error for Respondent to attempt to extend the jurisdiction of the lower court to provide relief not within the action.

Petitioners contend that the lower court erred in extending standing to non-moving strangers to the action to assume control of Petitioners' Motion For Return Of Corporate Properties and hold out relief to such non-moving strangers. Said strangers, who were interlopers in the aforesaid motion, had no standing to seek affirmative relief under Petitioners' motion.

Petitioners contend that even assuming, arguendo, that Respondent had jurisdiction over issues pertaining to the validity of

Petitioners' officers and directors, Respondent either misinterpreted or disregarded applicable statutes of the state of Nevada and general corporation law, both of which require judicial recognition of the entitlement of Petitioners' officers' and directors' to their respective offices. Under Nevada Revised Statutes (NRS) 78.340, hold over directors retain their offices and corporate duties. This result likewise obtains under the general rule of law. While maintaining and reasserting the de jure status of their officers and directors, Petitioners aver that under all applicable law, said officers and directors would in any event be accorded a de facto status.

ARGUMENT.

I.

THE DISTRICT COURT HAS ABUSED ITS DISCRETION IN REFUSING TO COMPLY WITH THE MANDATE OF THIS COURT IN ELY VALLEY MINES, INC. V. LEE, 9 Cir., 385 F.2d 188 ON GROUNDS WHICH THIS COURT HAS HELD ARE NOT WITHIN THE SCOPE OF THIS ACTION.

On March 16, 1962 the lower court appointed a receiver who assumed control over the records and properties belonging to Petitioners. This Court, in its 1964 decision in No. 17,709 (Pioche Mines Consolidated, Inc. v. Dolman, 9 Cir., 333 F.2d 257) held, inter alia, that said receiver had been wrongfully appointed and ordered the receivership vacated. It was further ordered that the action against the Petitioner Ely Valley Mines, Inc. be dismissed.

Over three years after the aforesaid decision in Pioche Mines Consolidated, Inc. v. Dolman, supra, the receiver still had possession

of and control over Petitioners' records and properties. This prompted the appeal in No. 19,761 to this Court for relief from a receiver who, in spite of the vacation of his receivership, still retained Petitioners' records and properties and enjoyed a status before the lower court which enabled him to continue obtaining restraining orders against Petitioners. During the major portion of the oral argument in the aforesaid appeal, counsel for defendants (Petitioners herein) argued concerning the problem of a lower court finding that the defendant corporations did not have valid officers and directors. This problem was of paramount importance to said corporations which were ostensibly joined in the action (No. 311, below) as nominal defendants and were nevertheless devastated by a finding which, if undisturbed, left the corporations "rudderless," without officers, directors or agents by and through which they could affirmatively assert themselves as legal entities. Counsel for defendants on appeal emphasized the extreme consequences of this finding by calling this Court's attention to the fact that Respondent had even refused to recognize legal counsel selected by the late JOHN JANNEY, as President, to represent the defendant corporations. Further, it was evident that the mandate of this Court requiring the receiver to return Petitioners' records and properties would remain indefinitely frustrated since, under the aforesaid finding, there were no authorized corporate officers or directors available to receive the properties. It was thus the chief concern of the aforesaid appeal to obtain relief from the corporate anarchy or limbo created by the aforesaid finding of the lower court.

It is respectfully submitted that the relief sought from the aforesaid finding of the lower court came with forceful clarity from this Court in Ely Valley Mines, Inc. v. Lee, 9 Cir., 385 F.2d 188, 190 when this Court held:

> "the judgment does not outlaw Janney, either personally or as president of either corporation, much less does it outlaw the two corporations. It certainly does not prohibit either corporation from asserting whatever right it may have in this litigation. Each is entitled, like every other litigant, to its full day in court, whether its pleading be signed or verified on its behalf by Janney as its president or by some other officer or agent. Each is entitled to have its counsel recognized in this case, whether or not they were retained on its behalf by Janney as president. He has not been removed as president. The directors and other officers have not been removed from office. And we have held that this is not an action for such relief." (See 333 F.2d at 273)

Buttressed and revitalized by the aforesaid decision of this Court, Petitioners filed their Motion For Return Of Corporate Properties on January 5, 1968--almost three and one-half years after the receiver

had first been ordered to return the properties and records of the defendant corporations. On February 12, 1968, the first hearing on the motion, Respondent made it clear that Petitioners were still to be involved in a fight for the lives of their officers and directors, while the receiver was to maintain his grasp on Petitioners' properties and records. The following statements of record are supportive of the foregoing premise and are indicative of Respondent's attitude concerning the receivership, the legal status of Petitioners' officers and directors and the return of their records and properties:

> "COURT: Haven't you also made some gesture as to whom--if the Court should order the return of the properties to the corporations, as to who the properties should be delivered to? Have we got valid officers of the corporations?
>
> "MR. SINGLETON: That is a question raised by Mr. Campini in the affidavit."
>
> (Tr. F-5: 20-25)
>
> "MR. STEFFEN: And they have been wrongfully deprived of their properties.
>
> "COURT: And that is a question I am not in agreement with the Court of Appeals on either. I am not cured of the feeling that the thing to do in this case was to appoint a Receiver -- but that is the way I feel

about it, and I say that in due respect to the Court of Appeals.

"I have been reversed a lot of times and so have they. I know that." (Tr. F-18: 20-25; 19: 1-4)

At the next hearing on said motion held March 12, 1968, the following statements were made:

"[COURT]: Now, from the statement of the Court of Appeals, I think we can all agree that it is the duty of the Court to return these properties to the corporations. But, who represents the corporations." (Tr. B-13: 7-10)

"COURT: My thought right at this moment is this. In a case of this kind, the Court should -- in circumstances where a receiver is appointed and it is found by the Court that the receivership was improperly - the receiver was improperly appointed, which I humbly disagree with -

"MR. SHENK: So do I, Your Honor; not humbly, but I sincerely believe -

"COURT: That is the command of the Court of Appeals." (Tr. B-24: 6-13)

"[COURT]: Now, it seems to me that we

1 haven't a valid Board of Directors.
2 "MR. SHENK: No, sir.
3 "COURT: The Board of Directors are
4 authorized, and the only ones authorized
5 to elect the officers. I want to turn this
6 property back right now to the proper
7 custodians and representatives of these
8 corporations, but I don't know who they
9 are." (Tr. B-26: 2-9)
10 "COURT: I want to deliver this property
11 back to the corporations and I want to know
12 beyond any doubt that the people to whom it
13 is ordered are rightfully entitled to it. That
14 is all I want. Isn't that the main point?
15 "MR. SHENK: It certainly is.
16 "COURT: And it is your contention that they
17 are not -
18 "MR. SHENK: It certainly is.
19 "COURT: And your associate's contention?
20 "MR. DeLANOY: Yes, your Honor."
21 (Tr. B-30: 16-24)
22 "COURT: I want to tell you something. I
23 think it is my duty to return this property to
24 the proper representatives of the corporations,
25 but I don't know who they are.

1 "MR. STEFFEN: Well, Your Honor, in
2 this Opinion it is stated that, No. 1, this
3 Court has always taken the position that
4 Janney was not a proper officer. This Court
5 held the fact that it is alleged that Janney is
6 not a proper officer is not a valid reason for
7 withholding the properties.
8 "COURT: No, it was not. It ordered them to
9 go back to the company.
10 "So, it recognizes Janney's authority as
11 president.
12 "Now, I don't know if this man Gallagher is
13 president or not. I have no idea. But I have
14 the idea that there is no valid existing Board
15 of Directors.
16 "MR. STEFFEN: Your Honor, this decision
17 specifically states that these Directors have not
18 been removed and this is not an action to question
19 the election of the Directors.
20 "COURT: They have a term, and I don't think
21 a corporation when elected is a king or monarchy
22 to serve for life. I don't believe that." (Tr. B-38:
23 1-21)
24 "COURT: I don't know if that is. I am not going
25 to turn this property back to anyone who I don't

1 believe is a valid officer of this corporation
2 until I am - I am not going to turn this property
3 back to anyone until it is determined that there
4 are proper officers -
5 "MR. STEFFEN: This proceeding is to validate
6 or otherwise the Board of Directors -
7 "COURT: I am going to take a recess. That is
8 the disposition - to determine the validity of the
9 existing Board of Directors. I have not decided
10 any matter. I am just looking for legal informa-
11 tion and factual information as supported by the
12 authorities." (Tr. B-40; 2-13)
13 The extent of the problem may be illustrated further by the
14 following excerpts from the last hearing on said motion, held May 22,
15 1968:
16 "COURT: I am going to add something, too. I
17 am going to retract--I am going to retract the
18 statement I made. I am not going to turn this
19 property over to anyone unless I am awfully
20 satisfied that the Court of Appeals thinks they
21 are who they say they are. Am I going too far?
22 "MR. SHENK: No, you are not." (Tr. N-13:
23 12-17)
24 "COURT: I am not saying these men are such at
25 all. I am not saying that these men are such, but

1 I am not going to turn these papers or any
2 documents of value over to anyone unless I
3 know from the minutes of a legally constituted
4 meeting of the Directors, elected by the stock-
5 holders of the corporation as shown by the
6 minutes of a stockholders' meeting, I am not
7 going to turn it over and I am going to have
8 those in Court or I am not going to act at all."
9 (Tr. N-17: 13-20)
10 "MR. STEFFEN: Suppose Mr. Janney was alive
11 and here today. Would you have returned those
12 records to Mr. Janney?
13 "COURT: I don't know. Because I did hold one
14 time he was not President of the corporation.
15 "MR. STEFFEN: That is right. Now, what did
16 the Court of Appeals hold?
17 "COURT: Mr. Janney is dead.
18 "MR. STEFFEN: That is correct.
19 "COURT: I don't know whether I would or not
20 return it to the man, and I don't see how in the
21 world--
22 "MR. STEFFEN: Didn't the Court of Appeals
23 order the records be returned, and the fact that
24 Mr. Janney was President did not--
25 "COURT: That is right. They went so far as to

order this Court to return them to the corporations. They didn't order the individuals to receive them.

"MR. STEFFEN: But they did state--

"COURT: Well, let them; you go up there and argue with them and see if they will make an order.

"MR. STEFFEN: I am reading directly from the order, your Honor, (reading) 'As we have pointed out, the fact that John Janney is still the President of each corporation is not such reason'--that is, a reason for not returning the properties.

"Now, in this Opinion the Court of Appeals stated that Janney has not been outlawed or removed as President.

"COURT: Why bring Janney into this?

"MR. STEFFEN: Then it goes on to state that the Directors have not been outlawed.

"COURT: You are not asking me to return them to Janney, are you?

"MR. STEFFEN: No, your Honor. I wish he was here. And then it goes on to say that the Directors have not been outlawed.

"Now, how can this Court say that these same

1 Directors--

2 "COURT: Now, what report is this. I have

3 the Advance Sheets--the one of August 24, 1964.

4 "MR. STEFFEN: It is the one at 385 Fed 2d 188.

5 "COURT: And I am looking at page 188.

6 "MR. STEFFEN: And if you will look at page

7 190, your Honor, and I might that I--

8 "COURT: What page?

9 "MR. STEFFEN: 190.

10 "COURT: All right.

11 "MR. STEFFEN: On paragraph one--

12 "COURT: Let me look at it a minute. This

13 concerns John Janney.

14 "MR. STEFFEN: And the Directors, your Honor.

15 "COURT: I have no reason to doubt that John

16 Janney was not--was elected by a duly qualified

17 procedure.

18 "MR. STEFFEN: This Court held that he was not.

19 "COURT: What?

20 "MR. STEFFEN: This Court held that he was not

21 President.

22 "COURT: Maybe I did. And maybe the facts would

23 carry it out. I am just talking for the record here

24 now.

25 "MR. STEFFEN: But, your Honor, the Court of

1 Appeals held otherwise and it went on to
2 state, (reading) 'He has not been removed
3 as President. The Directors and other
4 officers have not been removed from office
5 and we have held that such is not an action
6 for relief.'
7 "COURT: If that is true you can get a certi-
8 fied copy of the minutes of the meeting from
9 the Secretary of this corporation. Would you
10 accept that, Mr. Shenk?
11 "MR. STEFFEN: I have them right here, your
12 Honor.
13 "MR. SHENK: And I won't accept the certificate.
14 "COURT: No, from the Secretary. Is this the
15 Secretary of the corporation?
16 "MR. SHENK: He is so listed today.
17 "MR. STEFFEN: And he was at the time of this
18 Opinion." (Tr. N-17: 25; 18; 19; 20: 1-21)
19 "COURT: And I am not going to turn this property
20 over to somebody unless I am satisfied that he or
21 she is entitled to receive it. So, unless the Court
22 of Appeals assumes the responsibility for such
23 conduct and directs me to do it, I stand ready to
24 obey their directive." Tr. N-27: 19-23)
25 It can be seen from the foregoing statements by Respondent that:

(1) Respondent still maintains that the receivership was proper; (2) Respondent insists on adjudicating the legal status of Petitioners' officers and directors; (3) Respondent will not return the records and properties to Petitioners until he has judicially legitimated--from proof admitting of no doubt--the officers and directors of these petitioning corporations; and (4) Respondent invites an order of this Court directing the lower court to return Petitioners' records and properties.

"It is the duty of the District Court promptly to obey a mandate from the Appellate Court, and its failure to do so can be corrected by mandamus." Federal Home Loan Bank of San Francisco v. Hall, 9 Cir., 225 F.2d 349, 385, footnote 12. The case and footnote just cited referred to the case of Brictson Mfg. Co. v. Woodrough, 8 Cir., 284 F. 484, where it was held that the District Court was without power to delay the return of property held by a receiver declared by the Court of Appeals to have been wrongfully appointed, pending hearing of applications for intervention by other claimants.

In the instant case, Petitioners allege "abuse" of discretion by Respondent advisedly, since this Court left the door open for a prompt determination by Respondent as to a valid reason for not immediately returning Petitioners' records and properties. In the language of this Court's mandate,

> "The properties and records should be surrendered forthwith, unless the Court determines, promptly, that there is a good reason for not

> doing so. As we have pointed out, the fact that Janney is still the president of each corporation is not such a reason." Ely Valley Mines, Inc. v. Lee, supra, at page 193.

In a hearing on Petitioners' Motion for Return of Corporate Properties held March 12, 1968 Respondent declared that he was ready to order return of the corporate records and properties "right now" (Tr. B-26: 5-10) but held that he would not do so "until it is determined that there are proper officers." (Tr. B-40:2-6) By the Respondent's own admission, therefore, the only remaining impediment to the return of the records and properties was his own requirement concerning the validation of Petitioners' officers and directors.

Petitioners respectfully assert that the aforesaid impediment interjected by Respondent as an issue to be litigated and resolved prior to acting on this Court's said mandate, was an abuse of the discretion left to Respondent. This Court had settled the waters on this "issue," and yet Respondent refused to accept the determination of this Court.

Respondent argues, however, that this Court's mandate was based upon an incorrect assumption, i.e., that the defendant corporations had validly elected directors and officers. (See Respondent's Brief In Opposition To Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition, page 5.) It is inconceivable to Petitioners how Respondent can genuinely assert such an argument. All of the alleged facts concerning the alleged mismanagement of the late JOHN JANNEY have been before this Court previously. It is,

in fact, a gross understatement to note that this Court has been inundated with papers, pleadings, exhibits and records descriptive of the scope of the controversies between the parties. Respondent has added nothing new to the picture. He simply says, in effect, that if this Court had his insight it would have qualified its mandate by making it inapplicable as long as JANNEY was President of the corporations, and until such time as the directors and other officers passed muster under an adversary proceeding held in conjunction with the case in chief. Respondent thus takes the unarticulated but obvious position that this Court's said mandate was also afflicted with error in holding that this action is not a proper vehicle for purposes of determining the legal status of Petitioners' officers and directors.

Respondent also seeks to justify his avoidance of the mandate in Ely Valley Mines, Inc. v. Lee, supra, by stating that he has

> "not purported to "remove" the alleged directors of either corporation. The Trial Court has simply recognized the fact that in its opinion, neither corporation has any validly elected directors or officers to whom this Trial Court could, in good conscience, deliver the assets of either corporation." (Respondent's Brief In Opposition To Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition, page 5: Tr. N-25: 13-25; 26: 1-10)

By use of an obvious circumlocution, Respondent thus seeks to achieve the same result negatively which he was unable to accomplish positively. Since this Court has held that Petitioners' officers and directors have not been "outlawed" or "removed" the Respondent merely refuses to acknowledge their validity, thus taking the position that there are no officers or directors to remove, and that this Honorable Court erred in assuming there were. If this type of "back door" approach could be sustained by the law, it would create chaos among corporations. It would mean that, as here, a dissident stockholder purporting to own less than one per cent of the issued stock, could file a pretended derivative action ostensibly seeking damages on behalf of the corporation, and ultimately succeed in decapitating the governing board and officers of said corporation without even formally praying for such relief in the complaint! And it remains sadly inconceivable to Petitioners that Respondent's conscience will not permit him to recognize the authority of their officers and directors who have not been "removed" or "outlawed" but that it will permit him to continue the possession and control of Petitioners' records and properties in a distant receiver who has been "outlawed" and "removed" both by this Court and the Respondent in his judgment filed November 2, 1964.

Respondent's attempt, as noted above, to justify his refusal to recognize Petitioners' officers and directors as proper agents to receive the corporate records and properties is both specious and anomolous. It is specious because it openly assumes that Petitioners entered the litigation persona non grata while silently but of necessity

concluding that this Court either erred in holding that the late JANNEY and the officers and directors had not been outlawed or that this Court's mandate was inadequate in not having restricted its proclamation concerning the removal and outlawing of Petitioners' officers and directors only to those officers and directors found by Respondent to have proper authority. It was anomolous because Respondent openly accepted this Court's mandate in Ely Valley Mines, Inc. v. Lee, supra, as recognizing the late JOHN JANNEY as President of the defendant corporations, (See Tr. N-19: 25; 20: 1-7; and Tr. B-38: 11-12) and yet Respondent took the simultaneous position that although JANNEY had authority as President, the directors who employed him had no authority to do so. Certainly if the directors were without authority to act for the corporations, JANNEY could not have received from them an authoritative call to office.

Petitioners vigorously but respectfully assert that they have been denied their right to a prompt compliance with the mandate of this Court in Ely Valley Mines, Inc. v. Lee, supra, and that Respondent has no prerogative to assume error or inadequate draftsmanship on the part of this Court in order to avoid compliance with the clear import of its mandate.

In the most recent hearing on Petitioners' Motion For Return Of Corporate Properties, held May 22, 1968, Respondent first denied the motion (Tr. N-28: 14-24), then later withdrew the denial in order to use said motion as a vehicle for considering a form of relief sought by interlopers to the proceeding (Tr. N-38: 9-14) and finally ordered that

the hearing on the motion be continued indefinitely until Respondent sees fit to resume it. (Tr. N-43: 6-11) Petitioners were thus left with the stark realization that no relief was to be given them by Respondent unless they were to accede to a scheme conceived and asserted by strangers to the litigation which would deprive Petitioners of their rights both under this Court's said mandate and the statutes of the state of Nevada.

It is respectfully urged that Respondent has abused his discretion in refusing to return Petitioners' records and properties pursuant to the said mandate of this Court, and that Petitioners are entitled to a writ of mandamus in order to salvage a reasonably seasonable benefit from the said mandate.

II.

THE DISTRICT COURT HAS ERRED IN DEPRIVING PETITIONERS OF THEIR ENTITLEMENT TO IMMEDIATE RELIEF UNDER THE MANDATE OF THIS COURT IN ELY VALLEY MINES, INC. V. LEE, 9 Cir. 385 F.2d 188 BY REQUIRING PETITIONERS TO RELITIGATE AN "ISSUE" TWICE PREVIOUSLY DECIDED BY THIS COURT.

It is clear that a determination on the point of error here asserted turns on the meaning of the opinions of this Court under Pioche Mines Consolidated, Inc. v. Dolman, supra, and Ely Valley Mines, Inc. v. Lee, supra. Petitoners contend that the unambiguous declaration of the latter opinion is that the officers and directors functioning as of the date of said opinion had not been removed from office nor had they been outlawed, and that this is not an action for such relief. (See 385 F.2d at 190.) In both of the aforesaid decisions, this Court held that

this action was not a proper vehicle for attacking the legal status of Petitioners' officers and directors.

Armed with this Court's mandate in Ely Valley Mines, Inc. v. Lee, supra, Petitioners again sought the return of their records and properties from the tenacious receiver who had been wrongfully possessing and controlling them since 1962. According to said mandate the records and properties were to be "surrendered forthwith, unless the court determines, promptly, that there is a good reason for not doing so." (See 385 F.2d at 193.) At the initial hearing on Petitioners' Motion For Return Of Corporate Properties held February 12, 1968 it became immediately and painfully evident that Respondent would require a complete adjudication of the status of Petitioners' officers and directors as a condition precedent to the surrender of Petitioners' records and properties. In response to an unsworn "affidavit" by the deposed but still viable and acting receiver, AMERICO CAMPINI, the following colloquy occured:

> "COURT: Haven't you also made some gesture as to whom--if the Court should order the return of the properties to the corporations, as to who the properties should be delivered to? Have we got valid officers of the corporations?
>
> "MR. SINGLETON: That is a question raised by Mr. Campini in the affidavit." (Tr. F-5: 20-25)

Later, in the same hearing, Respondent declared:

> "COURT: There is a question to be raised here

as to who represents this corporation legally under the laws of Nevada."

(Tr. F-15: 13-15)

Thereafter, in subsequent hearings on said motion, the following statements were made:

"[COURT]: Now, from the statement of the Court of Appeals, I think we can all agree that it is the duty of the Court to return these properties to the corporations. But who represents the corporations." (Tr. B-13: 7-10)

"COURT: I am interested in endeavoring to come to a correct decision.

"MR. SHENK: Well, I believe the written briefs would be of great assistance.

"COURT: As to whether or not we have a valid Board of Directors?

"MR. SHENK: That is correct.

"COURT: And whether or not we have officers and Directors legally authorized to have anything to do with this corporation?

"MR. SHENK: That is correct.

"COURT: Especially holding or taking and receiving property belonging to the corporations.

"MR. SHENK: That is true." (Tr. B-29: 12-25)

"COURT: Yes. And there hasn't been one since. I don't believe we have got a Board of Directors. Now, I want authority on that, and what I am inclined to do is to continue this matter so that this could be briefed, because I am not going to turn back any properties of this corporation to anyone except duly authorized persons to represent the company and receive this property." (Tr. B-14: 7-13)

"COURT: I don't know if that is. I am not going to turn this property back to anyone who I don't believe is a valid officer of this corporation until I am - I am not going to turn this property back to anyone until it is determined that there are proper officers -

"MR. STEFFEN: This proceeding is to validate or otherwise the Board of Directors -

"COURT: I am going to take a recess. That is this disposition - to determine the validity of the existing Board of Directors. I have not decided any matter. I am just looking for legal information and factual information as supported by the authorities." (Tr. B-40: 2-13)

"[MR. SHENK]: Now, when this Court heard this action, your Honor, in 1962, there was a

1 specific -- I mean, this same contention
2 was raised. And this Court clearly
3 found, your Honor, --and I have recited
4 it in the--in our Memorandum, but in your
5 Findings of Fact, you clearly found, and I
6 am referring to Findings Number Ten--at
7 that time this Court found that no valid stock-
8 holders' meetings have been held of Pioche
9 Mines Consolidated, Inc. since its incorpora-
10 tion in 1928 with the exception of one meeting
11 in 1942 or 1943. That is the one to which
12 Mr. Shaw has here related.
13 "Without just cause, no valid meeting of the
14 stockholders of Ely Valley Mines, Inc. has
15 been held since 1957--without just cause.
16 "And sub-division four under this Finding,
17 after that initial Finding, the Court recites,
18 'No valid Board of Directors have been elected
19 by said corporations personnel--without just
20 cause.'
21 "Now, that Finding was not disturbed on Appeal,
22 your Honor. It has remained as a Finding of
23 this Court that has had the approval and the
24 blessing of the Ninth Circuit Court of Appeals
25 and the United States Supreme Court." (Tr. N-11: 11-25;

12: 1-7)

"COURT: This becomes the subject, that the officers and directors were not removed from office. That is not the only thing involved here. The question is if their terms expired were they ever re-elected.

"MR. SHENK: That is my position, your Honor, and contrary to what Counsel states here. This Court never undertook to remove any alleged officers from office.

"COURT: No.

"MR. SHENK: But you did make a determination and finding that those individuals holding themselves out as a Director and an officer did not hold such an office pursuant to the elections of a meeting of stockholders as required by law."

(Tr. N-25: 13-25)

It is thus irrefutable that Respondent has persisted to use the instant action as a vehicle for determining "issues" and questions pertaining to the validity of Petitoners' officers and directors. Respondent's effort to avoid the impression of not having "removed" Petitioners' officers and directors is sheer sophism. (See also, Respondent's Brief In Opposition To Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition, page 5.) A finding by Respondent that Petitioners' officers and directors have not

been validly elected and have no authority to act on behalf of the corporations is tantamount to "removing" or "outlawing" said officers and directors.

The gravamen of Petitioners' position asserted here is that this Court has twice previously held that this action is not suitable for attacking or questioning the legal status of Petitioners' officers and directors and that, pursuant to the opinion in Ely Valley Mines, Inc. v. Lee, supra, Petitioners' officers and directors are to be recognized by Respondent since they have not been outlawed or removed from office. In spite of the clear and unambiguous language in the aforesaid opinions of this Court, Respondent requires the relitigation or continued litigation of the legal status of Petitioners' officers and directors. This has now become the major point of issue and dispute in the entire proceeding.

In this Court's opinion in Federal Home Loan Bank of San Francisco v. Hall, 9 Cir., 225 F.2d 349, 371 it was held:

> "there is ample precedent in the cases to sustain the principle that an opinion of an appellate court is to be consulted to ascertain what was intended by its mandate and that questions considered and decided in the opinion of the court are not to be reexamined in any subsequent stage of the same case."

The point is further emphasized in Lummas Co. v. Commonwealth Oil

Refining Co., 2 Cir., 297 F.2d 80, cert. denied, 82 S. Ct. 601, wherein it was held:

> "the right not to have to relitigate an issue so determined [by Court of Appeals] is as much entitled to extraordinary protection as the right to jury trial, the right to trial before an unbiased judge, or the right to trial directly by a judge rather than initially by a master."

It was the duty of the District Court to promptly obey the mandate of this Court in both Pioche Mines Consolidated, Inc. v. Dolman, supra, and especially Ely Valley Mines, Inc. v. Lee, supra. See Federal Home Loan Bank of San Francisco v. Hall, supra, at page 385, footnote 12. Because the lower court has persisted in requiring Petitioners to relitigate the alleged "issue" concerning the validity of their officers and directors after the question has twice previously been decided by this Court, Petitioners have been greatly prejudiced and injured by an additional and unnecessary delay, extending at least beyond one year, in the return of their corporate records and properties. Such delay has greatly pyramided the costs of this litigation.

Petitioners respectfully submit that Respondent has erred in attempting to adjudicate the legal status of the officers and directors of the defendant corporations since, as noted above, this Court has twice previously disposed of the "issue"--even to the extent of holding that this action is not a proper vehicle for such relief. Under the law,

Petitioners are entitled to the benefit of said Appellate rulings without having to relitigate their propriety in the lower court.

III.

THE DISTRICT COURT HAS EXCEEDED ITS JURISDICTION IN REQUIRING AN ADJUDICATION OF THE VALIDITY OF PETITIONERS' OFFICERS AND DIRECTORS PRELIMINARY TO THE RETURN OF THE CORPORATE RECORDS AND PROPERTIES SINCE THE LEGAL STATUS OF SAID OFFICERS AND DIRECTORS IS NOT AN ISSUE IN THE ACTION.

In both the 1964 decision of Pioche Mines Consolidated, Inc. v. Dolman, supra, and Ely Valley Mines, Inc. v. Lee, supra, this Court held that this action was not a proper vehicle for providing relief pertaining to the removal or impeachment of Petitioners' officers and directors. In the former opinion, this Court even went so far as to spell out the proper statutory means for obtaining such relief.

The amended complaint sought no relief against the corporations --only JANNEY. This was the basis for this Court's ruling in No. 19,745 that the defendant corporations (Petitioners herein) were not to be accorded the right to answer the Amended Complaint. Petitioners, in law, were only nominal defendants. Or so they were told. Nevertheless, Respondent has, for all intents and purposes--and certainly in practical effect--treated the action as one seeking to depose and disfranchise Petitioners' officers and directors. Respondent cannot alter this fact by now taking the position that he simply doesn't know who they are and must be convinced of their credentials, "beyond all doubt" before he will recognize their authority to act for the

corporations. Such an oblique approach is just as devastating to Petitioners as Respondent's initial finding that Petitioners have no valid board of directors. It is submitted that if Respondent is able to parlay an action against the late JANNEY into an action against Petitoners' officers and directors, that a denial of the right of Petitioners to answer the Amended Complaint would, in the least, amount to a denial of due process.

Pertinent to the point of error specified herein is the following authority:

> "Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, <u>the Court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded.</u> A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved." <u>Sylvan Breach v. Koch,</u> 8 Cir., 140 F.2d 852, 861. (emphasis added)

Petitioners have consistently objected to Respondent's consideration of "issues" pertaining to the legal status of their directors. They most certainly have never consented to the litigation of such "issues." And such "issues" were never asserted in any of the pleadings, nor did plaintiffs ever pray for relief against Petitioners. Respondent cannot

undertake to adjudicate a controversy of its own motion, but can do so only when presented by a party within the framework of a proper pleading. 20 Am Jur 2d Courts, §94, p. 455. It is also the "general rule that questions that are not within the issue presented by the pleadings may not be determined by the courts." 41 Am Jur Pleading, §368, p. 544. See also, Garrett v. Louisville & N. R. Co., 235 U.S. 308, 58 L. Ed 242, 35 S. Ct. 32.

In the United States Supreme Court case of United States v. Northern Pacific R. Co., 177 U.S. 435, 44 L. Ed 836, 20 S. Ct. 706, the plaintiff sought to obtain a forfeiture of defendant's property, even though such relief had not been pleaded. The Court there pronounced the general rule quoted above, and further held:

> "Courts have no jurisdiction to consider or determine the question of the forfeiture of a railroad grant until it is raised by direct allegations in a suit instituted by lawful authority for the express purpose of presenting it." (20 S. Ct. at 707)

The lower court is without jurisdiction to adjudicate or consider issues and questions aliunde the pleadings. "Pleadings...are designed to raise material issues, and without such issues there is nothing for the Court or the jury to pass upon." 41 Am Jur Pleading, §393, p. 563. Based upon the above authorities, it is clear that the lower court exceeded its jurisdiction in adjudicating, attempting to adjudicate or in considering questions pertaining to the legal status of Petitioners'

officers and directors.

IV.

IN ACTING UPON PLAINTIFFS' CONTENTION THAT THE PETITIONERS WERE WITHOUT VALID OFFICERS AND DIRECTORS AND REFUSING TO RETURN PETITIONERS' PROPERTIES AND RECORDS UNTIL SAID OFFICERS AND DIRECTORS WERE JUDICIALL "BORN AGAIN," THE DISTRICT COURT PROVIDED RELIEF TO THE PLAINTIFFS WHICH WAS OUTSIDE THE SCOPE OF THE PLEADINGS, AND HENCE BEYOND THE JURISDICTION OF THE COURT.

Although no relief was being sought against Petitioners in the pleadings, Respondent accepted plaintiffs' contention that Petitioners were without valid directors and entered a finding accordingly. Respondent now asserts, as did Appellees in Nos. 19745, 19761 and 21099, that his finding is the law of the case and was "undisturbed on appeal." (See page 3 of Respondent's Brief In Opposition to Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition.) Petitioners are unable to comprehend the basis for such an assertion. Appellees, in the aforesaid appeals, contended as follows:

> "The trial court has found, and it has become the law of the case, that these corporations have no valid boards of directors, and therefore, no valid officers."
> Appellees' Reply Brief, p. 2.

In reply to the foregoing contention, this Court sought to resolve a "misapprehension" besetting Appellees and the Respondent. The opinio in Ely Valley Mines, Inc. v. Lee, supra, then proceeded to hold that

Petitoners' officers and directors have not been outlawed or removed, and that such results were not obtainable in this action. Respondent has nevertheless persisted to sustain his finding against the Petitioners Whether one describes Respondent's position as being supportive of his initial finding against the validity of Petitioners' officers and directors, or as merely refusing to return Petitioners' records and properties until they satisfy Respondent's impossible standards of proof as to the legal status of their officers and directors--the effect is identical. In both instances, Respondent refuses to recognize the authority of Petitoners' officers and directors to receive corporate records and properties. This relief is clearly responsive to the unpleaded requests of plaintiff DOLMAN and receiver CAMPINI.

Pertinent to the point here considered is the rule of law that declares a judgment invalid which is not responsive to the pleadings. Reynolds v. Stockton, 140 U.S. 254, 11 S. Ct. 773. It has also been held that "a court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. Sylvan Breach v. Koch, supra. See also, Steffen v. United States, 6 Cir., 213 F.2d 266, 272; Cox v. United States, 6 Pet. (U.S.) 172, 8 L. Ed 359, 370; Real De Dolores Del Oro v. United States, 175 U.S. 71, 44 L. Ed 76, 20 S. Ct. 17.

Respondent has fashioned relief for plaintiffs which is beyond the scope of the pleadings and outside the prayer of the Amended Complaint. Such relief is beyond the jurisdiction of the lower court.

V.

IT WAS ERROR FOR THE DISTRICT COURT TO USE PETITIONERS' MOTION FOR RETURN OF CORPORATE PROPERTIES AS A VEHICLE FOR PROVIDING RELIEF ALIUNDE THE MOTION.

It is elementary that a motion constitutes an application on the part of the moving party for an order of court. 37 Am Jur Motions Rules and Orders, §3, p. 502; Perry v. United States, 90 App. D.C. 186, 195 F.2d 37. Petitioners' Motion For Return Of Corporate Properties was an application by the defendant corporations for specific relief pursuant to the mandate of this Court in Ely Valley Mines Inc. v. Lee, supra. The moving parties were the Petitioners herein. No one other than said moving parties had standing to seek relief by way of an order of court in this proceeding. Mantin v. Broadcast Music, Inc., 9 Cir., 248 F.2d 530, 531. As indicated under paragraph I, above, Respondent first denied Petitioners' motion and later withdrew his denial in order to have the parties consider a plan proposed by a stranger to the action, New York attorney Murray Sargent, who was notified of the hearing by Respondent.

Mr. Sargent's proposal called for stockholders meetings called by a committee of three, including the receiver, himself and Mr. Jack Crichton, present President of the defendant corporations, under the supervision of the lower court. (Tr. N-36: 10-16) The proposal was clearly objectionable to Petitioners for several reasons, including the fact that the JANNEY stock was to be excluded from the voting and that the receiver, whose only remaining function is to render an accounting,

was to again affirmatively assert control in Petitioners' affairs. Basically, however, the entire procedure was improper in that non-moving parties--indeed, strangers to the litigation--had taken control of Petitioners' motion and were seeking to obtain their brand of relief thereunder. Respondent readily accommodated the non-moving interlopers and effectively gave Petitioners the choice of an indefinite recess on their motion or the prospect of eventual "relief" based upon an unacceptable proposal foisted on Petitioners by strangers to the litigation.

It is respectfully submitted that Respondent erred in holding open the doors of Petitioners' motion for possible eventual relief to be granted pursuant to the requests of non-moving strangers who had no standing in the proceeding.

VI.

AFTER COMMITTING ERROR IN REQUIRING THE PARTIES TO SUBMIT BRIEFS AS TO THE VALIDITY OF PETITIONERS' OFFICERS AND DIRECTORS, THE DISTRICT COURT COMPOUNDED THE ERROR BY DISREGARDING, MISCONSTRUING OR OTHERWISE FAILING OR REFUSING TO APPLY PERTINENT NEVADA AND GENERAL CORPORATE LAW CONCERNING THE STATUS OF PETITIONERS' CORPORATE OFFICERS AND DIRECTORS.

During the hearing on Petitioners' Motion For Return Of Corporate Properties held March 12, 1968, Respondent ordered the parties to submit briefs as to the validity of Petitioners' officers and directors. (Tr. B-30: 12-25; 31: 1-19) As a result of said order, the parties filed the briefs identified as Exhibits I, J and K to this Petition. Petitioners request this Court's indulgence in allowing

Petitioners to substantially repeat herein the substance of the said Exhibit I in order to consolidate in this brief those matters pertinent to this point of specified error. It is noteworthy that in spite of the aforesaid briefs, Respondent has never entered a finding as to the applicable law. For all intents and purposes, however, he has either found the law to be supportive of his earlier finding invalidating Petitioners' officers and directors or he has chosen to disregard the law. In view of the conclusive character of both Nevada statute law and general corporate law on the subject, Petitioners can only conclude respectfully, that Respondent has elected to circumvent the applicable law. This Court, in its opinion in Pioche Mines Consolidated, Inc. v. Dolman, supra, later reaffirmed and reiterated in Ely Valley Mines, Inc. v. Lee, supra, pronounced the statutory methods for obtaining relief against wrongfully entrenched officers and directors. It was clear, as declared by this Court, that since this action was not based upon or instituted pursuant to the statutory requisites for seeking such relief, that indeed no such relief could be obtained in this action. (See 333 F.2d at 273) For the sake of reasonable brevity, and in view of this Court's familiarity with pertinent Nevada statutes cited as aforesaid by this Court, and set forth in Exhibit I to this Petition, Petitioner will not repeat them here. Suffice it to say that the statutory methods for obtaining relief against corporate officers and directors are clear, cannot be circumvented by Respondent, and that

> "there can be no recovery upon a cause of action however meritorious it may be, or

> however satisfactorily proved, that is in substance variant from that which is pleaded by the plaintiff...."

41 Am Jur Pleading, §382, p. 556 citing numerous cases including Reynolds v. Stockton, 140 U.S. 254, 35 L. Ed 464, 11 S. Ct. 773. So assuming, arguendo, that Respondent's position concerning the invalidity of Petitioners' officers and directors is correct, he may nevertheless not act thereupon in the instant action. It is simply not the jurisdictional prerogative of Respondent to question the legal status of Petitioners' officers and directors in this action.

Assuming, arguendo, that the instant action is a proper proceeding for relief against Petitioners' officers and directors, it is apparent that Respondent has either misconstrued, disregarded or otherwise failed or refused to apply applicable Nevada statute law as well as general corporation law. Respondent clings tenaciously to Nevada Revised Statutes (NRS) Section 78.330(2) which reads as follows

> "2. At least one-fourth in number of the directors of every corporation shall be elected annually."

Respondent asserts that the above provision is mandatory and thereafter concludes that any failure to comply with its terms automatically deposes or invalidates the directors. Unfortunately, Respondent has either disregarded or failed to recognize the statutory provision which applies in instances where the annual election, as set forth in NRS 78.330(2), above, is not held. NRS 78.340 is directly pertinent and

reads as follows:

> "Failure to hold election of directors on regular day does not dissolve corporation. If the directors shall not be elected on the day designated for the purpose, the corporation shall not for that reason be dissolved; <u>but every director shall continue to hold his office and discharge his duties until his successor has been elected</u>." (emphasis added)

It is thus clearly intended under Nevada law that a corporate structure is not to collapse because of any failure to hold an annual election of directors by the stockholders. Respondent would have us believe, by referring only to NRS 78.335(3) (See Respondent's Brief In Opposition To Motion For Leave To File Petition For Writ Of Mandamus And For Writ Of Prohibition, page 7) that vacancies among directors may be filled by the remaining directors only for the unexpired term and that at the expiration thereof, the director's authority ends unless he is re-elected by the stockholders. Under NRS 78.340 this is simply not so, as "<u>every director shall continue to hold his office and discharge his duties until his successor has been elected</u>." (emphasis added)

Petitioners do not quarrel with the requirement of NRS 78.330 (2) concerning the annual election of one-fourth of a corporations directors. It is submitted, however, that said provision is irrelevent to the instant action. Petitioners are not contesting the right of a stockholder to properly petition a court for an annual election--that

right is not at issue in this action--nor has such relief been sought. Petitioners do contend, however, that under Nevada law cited above, the failure to hold an annual election pursuant to NRS 78.330(2) will not ipso facto depose or disfranchise corporate directors. Indeed, under such circumstances, NRS 78.340 clearly imposes on the hold-over directors, a continued responsibility to discharge the duties of their office.

Petitioners' position as to the effect of NRS 78.340 on hold-over directors is fully supported by the general corporation law and case authorities. Pertinent to this prémise is the following:

> "Directors, trustees or other officers of a corporation, elected or appointed for a certain time, hold over after the expiration of their term until their successors are elected or appointed, and only the corporation itself can complain of an exercise of official functions by officers and directors whose terms have expired but whose successors have not been elected. Accordingly, with respect to tenure of office, the general rule is that the failure of a corporate body to elect officers or directors does not end the terms of those previously elected. Frequently there is an express provision to this effect in the charter of a corporation or the general law. Failure to elect

officers results in continuing the old officers in power. Thus, where the corporation fails to hold its regular annual meeting for the election of directors, the directors then in office hold over until their successors are elected." Fletcher Cyclopedia Corporations, Vol 2, Holding Over, §344, p. 135 (emphasis added); also §375, p. 266. See also, Schuckman v. Rubenstein, 6 Cir., 164 F.2d 952; Liken v. Shaffer, 64 F. Supp. 432, 450 (D.C. Iowa, 1946)

Even if it were argued that the officers and directors of the defendant corporations enjoyed only a de facto status, the law clearly prohibits a collateral attack on their authority.

"If persons are de facto officers, their title to the office cannot be impeached collaterally by third persons; their right to the offices claimed and exercised by them can only be tested in a quo warranto proceeding, or by the statutory methods provided in many states...."

"For instance, third persons dealing with de facto directors cannot collaterally show the illegality of the election of the de facto

officers, where no other persons are claiming a right to act as directors, and the incumbents are exercising the usual functions of the office. So where de facto directors move to dismiss an appeal, their title to the office cannot be attacked by the party opposing the motion." Fletcher Cyclopedia Corporations, Vol 2 §387, Collateral Attack on Directors, p. 223-225 (emphasis added)

Here, several of the directors have served and functioned as such for many years, and vacancies within their numbers have been filled by the action of the remaining members of the boards. This is strictly in accordance with Nevada law[1] providing for the filling of vacancies by a majority of remaining directors unless otherwise provided in the articles of incorporation. The articles of Ely Valley Mines, Inc., Article Seventh, expressly provides that vacancies may be filled by the directors "until their successors are elected and qualified." There is no provision in the articles of Pioche Mines Consolidated, Inc. which prohibits the directors from filling vacancies among their number, so the law of Nevada as cited in the footnote below is applicable.

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[1]The pertinent provision under NRS 78.335 reads as follows:
"2. All vacancies, including those caused by an increase in the number of directors, may be filled by a majority of the remaining directors, though less than a quorum, unless it is otherwise provided in the certificate or articles of incorporation or an amendment thereof."

It must also be emphasized strongly that there are no parties other than the presently constituted boards of directors and officers who claim the right to said positions. There are no other persons claiming to function as such. Although Petitioners do not admit -- or even hint--that their directors and officers enjoy anything less than a de jure status, it is indisputable that they would qualify as de facto directors and officers in any event.

Petitioners conclude that even if Respondent was jurisdictionally entitled to adjudicate the legal status of Petitioners' officers and directors, he has erred in his interpretation, application or disregard of the law as noted above.

CONCLUSION.

Petitioners respectfully submit that the cumulative impact of the facts, transcripts and documents now before this Court in this instant proceeding supports Petitioners' position as to the issues presented herein, and clearly indicates that Respondent will not return Petitioners' records and properties to any present officer, director or agent of the petititioning corporations unless specifically so ordered by this Court. Petitioners accordingly pray for issuance of a writ of mandamus from this Court which shall deprive Respondent of all discretion in the premises, and shall compel the District Court and the said Respondent to order the immediate return of Petitioners' records and properties to any officer, director or agent specified on the current annual list of officers, directors and resident agent required

by Nevada Revised Statutes (NRS) 78.150.

Petitioners also pray this Court for the issuance of a writ of prohibition prohibiting the District Court, and each and all of its Judges to whom the main action may be assigned, for any and all purposes, proceedings and hearings, including the Respondent, from considering, hearing or litigating any question, issue or matter pertaining to the validity or legal status of the directors and officers of the defendant corporations and enjoining plaintiffs below, the receiver AMERICO CAMPINI, and their counsel from interfering with the immediate return of the properties and records of defendant corporations and the operation and use thereof.

Dated August 23, 1968.

Respectfully submitted,

JOHNSON & STEFFEN

BY THOMAS L. STEFFEN

THOMAS L. STEFFEN
Counsel for Petitioners
112 North Third Street
Las Vegas, Nevada

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---oOo---

PIOCHE MINES CONSOLIDATED, INC., and ELY VALLEY MINES, INC.,

Petitioners,

vs.

THE HONORABLE ROGER T. FOLEY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

CAROL M. SLAGLE, being first duly sworn, deposes and says:

That on the 26th day of August, 1968, she delivered a copy of Petitioners' Opening Brief to The Honorable ROGER T. FOLEY, at his office in the United States District Court, Federal Building, Las Vegas Boulevard South, Las Vegas, Nevada.

DATED this 26th day of August, 1968.

Carol M. Slagle

Carol M. Slagle

SUBSCRIBED AND SWORN to
before me this 26th day of August, 1968.

THOMAS L. STEFFEN

Notary Public

RECEIPT OF TWO COPIES of the above and foregoing PETITIONERS' OPENING BRIEF is hereby acknowledged this _____ day of August, 1968.

SAMUEL C. SHENK

SINGLETON, DELANOY, JEMISON & REID, Chartered

BY_____
Counsel for Respondents
302 East Carson
Las Vegas, Nevada